



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

HMCA NO. 158 OF 2008

REPUBLIC.....APPLICANT

VERSUS

MARAKWET DISTRICT LAND DISPUTES TRIBUNALS.....1ST RESPONDENT
SENIOR RESIDENT MAGISTRATE ITEN LAW COURTS.....2ND RESPONDENT
KIMISOI CHEMWETICH.....3RD RESPONDENT
HON. ATTORNEY GENERAL.....4TH RESPONDENT
KIPLAGAT CHEMWETICH.....EXPARTE APPLICANT

RULING:

The Notice of Motion herein is dated the 7th day of May, 2008 and is brought under Order 53 Rule 3 & 4 of the Civil Procedure Rules and Sections 8 & 9 of the Law Reform Act and all other enabling powers and provisions of the law.

The Applicant is seeking an order for certiorari to move into Honourable court to quash the decision of the Marakwet District Land Disputes Tribunal which was read and adopted as a judgment of court on the 6th February 2008 by the Senior Resident Magistrates Court, Iten.

All the Respondents were duly served and were represented at the hearing hereof. The 1st, 2nd and 4th Respondents were represented by Learned State Counsel Eldoret, Mr. Ngumbi and the 3rd Respondents were represented by Learned Counsel, Mr. Chemwok.

I have heard the submissions of all counsel concerned and have perused the proceedings of the Land Disputes Tribunal on the matter adjudicated by the said Tribunal. The application has merit as the dispute adjudicated upon related to succession and distribution and not trespass. The Tribunal had no jurisdiction to hear and determine matters related to succession and make orders for distribution of property.

Nevertheless I am not inclined to grant the orders sought as the Notice of Motion is brought with defects and the application can be referred to as a non-starter.

The first defect is that the application is not preceded by a Notice served on the presiding officer in terms of Order 53 Rule 3(2). The operative word here is “**SHALL**” and this was not done.

The second omission relates to the accompanying Statement of Facts and Verifying Affidavit filed with the Notice of Motion before this court.

I find that the Applicant applied for leave and the same was granted. Thereafter the Applicant was directed to file a substantive motion within a specified period, which was done. This being the said Notice of Motion before this court is dated 7th May, 2008.

The applicant failed to file a fresh statement and fresh affidavit to accompany the Notice of Motion but instead appended the same ones utilized when requesting for leave. This then means that the substantive motion is unsupported. In applications for judicial review the Statement of Fact and the Verifying Affidavit constitute the pleadings. The prayers sought in the Statement should also be the same as those set out in the substantive motion.

The statement contains the grounds upon which the application is brought and the reliefs/prayers sought, whilst the affidavit contains the evidence.

The Statement and Verifying Affidavit cannot even be amended suo moto or otherwise because both are unrelated to the present application and are annexures/appendages.

In the absence of the accompanying Statement of Facts and the Verifying Affidavit the Notice of Motion is nothing but a heading.

I find that the Notice of Motion is incompetent and does not comply with Order 53 as there is no evidence to support the Notice of Motion.

The same is hereby struck out. Each party to bear their own costs.

Dated and Delivered at Eldoret this 20Th day of January 2012.

A. MSHILA
JUDGE